

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MICHAEL J. KNEITEL,

Plaintiff,

-against-

HOWARD SCHAIN,

Defendant.

MEMORANDUM & ORDER
13-CV-90 (EK) (PK)

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ERIC KOMITEE, United States District Judge:

The Court has received Magistrate Judge Kuo's Report and Recommendation (R&R) dated April 1, 2022. ECF No. 84. Judge Kuo recommends that the complaint be dismissed with prejudice for failure to comply with the Court's orders and failure to prosecute the case. Neither party has filed objections and the time to do so has expired. Accordingly, the Court reviews Judge Kuo's recommendation for clear error on the face of the record. See Advisory Comm. Notes to Fed. R. Civ. P. 72(b); accord *State Farm Mut. Auto. Ins. Co. v. Grafman*, 968 F. Supp. 2d 480, 481 (E.D.N.Y. 2013).

A case may be dismissed *sua sponte* for failure to prosecute or failure to comply with a court order. Fed. R. Civ. P. 41(b); *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001). Factors a court must consider when weighing dismissal pursuant to Rule 41(b) include "(1) the duration of

the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal." *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014).

For the reasons Judge Kuo stated in the R&R, each of these factors weighs in favor of dismissal. Most significantly, Plaintiff has repeatedly disregarded the Court's orders over a sustained period of time. He failed to appear for a deposition on three occasions, see Order to Show Cause 1-2, ECF No. 81, and failed to respond to an order to show cause why this case should be dismissed. See R&R 2 (citing ECF No. 81).¹ After Plaintiff failed to appear for his deposition, Judge Kuo initially imposed sanctions short of dismissal, but Plaintiff continued to disregard the order to show cause even when Judge Kuo warned Plaintiff that failure to comply with it would result in her recommending dismissal. The case, as Judge Kuo recounts, has been pending for nine years, yet Plaintiff has produced no

¹ Plaintiff produced no documents in discovery (or thereafter) in the case. See R&R 1-2.

evidence to support his claims. R&R 4. Defendant would thus, as the R&R recognized, continue to be prejudiced by further delay. And Plaintiff's interest in having his case heard – recognized in the fourth *Baptiste* factor – does not balance favorably against the Court's interest in controlling its docket, given that Plaintiff would be going to trial with no admissible evidence. See R&R 3-4.

Having reviewed the record, I find no clear error and therefore adopt the R&R in its entirety. Thus, the case is dismissed with prejudice. The Clerk of Court is respectfully directed to enter judgment and close the case.

SO ORDERED.

/s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: April 20, 2022
Brooklyn, New York